"the road construction necessary for the extraction works of timbers as required under Clause 3 of the Agreement" .....

These two letters from the respondent clearly indicate that the construction of the two miles of road outside the Contract Area was not enough and that the appellant was required to continue constructing the road "necessary for the extraction works".

As to the respondent's case not being supported by its Statement of Defence, we need only to reproduce the relevant paragraphs of this Statement of Defence and Counterclaim to show that this issue was pleaded:

(a) "The Plaintiff did not complete or failed to complete the said main roads in accordance with the regulations, rules, directions and requirements of the Forest Department or with the terms and conditions of the Timber Licence."
(para 4 of Statement of Defence)

(b) "the Defendant ..... did inform the Plaintiff verbally that the main road was not completed to the extent that blocks could be applied."
(para 6 of Statement of Defence)

(c) "The Defendant verbally informed the Plaintiff that it had to build and complete road construction undertaken under the said agreement in accordance with the regulations, rules, directions and requirements of the said Forest Department."
(para 10 of Statement of Defence/Counterclaim)

(d) "Then on or about ..... the Defendant ..... gave notice to the Plaintiff for it to complete road construction necessary for extraction works. The Plaintiff failed or omitted to do so ...."
(para 10 of Statement of Defence/Counterclaim)

The Statement of Defence may not be happily drafted in a way we would like it to be drafted, but it certainly does contain the respondent's contention that the appellant had to construct not only the road outside but also the road inside the Contract Area.

For the reasons given in the foregoing paragraphs we therefore dismiss this appeal with costs. Deposit to respondent against taxed costs.

Appeal dismissed.

Solicitors: *K.Y. Lin & Co.; Yong & Wong.*

YAP AMI & ANOR. v. TAN HUI PANG

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Abdul Hamid F.J.) June 5 & July 17, 1982]

[Kota Bharu – Federal Court Civil Appeal No. 149 of 1981]

Tort – Death in wild boar hunting accident – Damages for loss of dependency – Damages for loss of future earnings for the benefit of the estate – Civil Law Act, 1956, ss. 7 & 8.

In this case the deceased died in a wild boar hunting accident. His widow and another as representatives of his estate sued for damages on behalf of the deceased's dependants under section 7 and on behalf of his estate under section 8 of the Civil Law Act, 1956. Liability to the extent of 70% was admitted and the only question for the learned trial judge was damages. He awarded $2,800 for loss of expectation of life, $959 special damages and costs. He made no award for loss of dependency because on the agreed facts the deceased before his death was an active partner in a firm and as such partner was drawing $1450 per month and after this death that very sum was paid to the dependants as the deceased's share of the profits. He held therefore that the dependants suffered no loss. The appellants appealed.

Held: the plaintiffs were entitled to damages for loss of future earnings but in this case as the estate and the dependants had lost nothing, the learned trial judge was correct in making no award for loss of dependency.

Cases referred to:

(1) *Gammell* v. *Wilson* [1982] A.C. 27.
(2) *Thangavelu* v. *Chia Kok Bin* [1981] 2 M.L.J. 277.
(3) *Bishop* v. *Cunard White Star Co. Ltd.* [1950] P. 240; [1950] 2 All E.R. 22.
(4) *Davies* v. *Powell Duffryn Collieries* [1942] A.C. 601.
(5) *Taylor* v. *O'Connor* [1971] A.C. 115.
(6) *Pym* v. *Great Northern Ry.* (1863) 4 B. & S. 396; 122 E.R. 508.
(7) *New Monckton Collieries Ltd.* v. *Keeling* [1911] A.C. 648
(8) *Lee* v. *S.S. Bessie* [1912] 1 K.B. 83.

FEDERAL COURT.

Ong Chin Beng (*Foo Say Ghee* with him) for the appellant.

H.S. Lim for the respondent.

Cur. Adv. Vult.

Suffian L.P. (read by Abdul Hamid F.J.): Mr Chua Kim Long ("the deceased") died in a wild boar hunting accident in Telaga Papan, Trengganu, and his widow and another as representatives of his estate sued for damages on behalf of the deceased's dependants under section 7 and on behalf of his estate under section 8 of the Civil Law Ordinance, 1956 ("the Ordinance").

Liability to the extent of 70% was admitted and so the only question for the learned trial Judge

was damages. In the event, he awarded $2,800 for loss of expectation of life, $959 special damages, and costs of $1,000; all amounts agreed. He made no award for loss of dependency.

It is against this last that the plaintiffs have appealed to us.

Sections 7 and 8 of the Ordinance provide:

"7. (1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code.

(2) Every such action shall be for the benefit of the wife, husband, parent, and child, if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased.

8. (1) Subject to this section, on death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate:

Provided that ..... (not relevant).

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person –

(a) .....

(b) .....

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

(5) The rights conferred by this section for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by section 7 and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said section as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1)."

These provisions are *in pari materia* with the English Fatal Accidents Act 1976 and the English Law Reform (Miscellaneous Provisions) Act, 1934 ("the 1934 Act").

The provision that is specifically relevant is subsection 8(2) (c) of our Ordinance. The corresponding English provision i.e. section 1(2) (c) of the 1934 Act fell to be considered by the House of Lords in *Gammell* v. *Wilson*[1].

That provision and subsection (1) of the section read:

"(1) Subject to the provisions of this section, on the death of any person . . . all causes of action . . . vested in him shall survive . . . for the benefit of his estate . . .

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person . . .

(a) .....

(b) .....

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death . . ."

In *Gammell*[1] the deceased, when he was 15 years old, was killed by the negligent driving of the first defendant, an employee of the second defendants. The deceased's father brought an action claiming damages (1) under the Fatal Accidents Act 1976 for himself and his wife, as dependants of their dead son, and (2) also as administrator of the deceased's estate under section 1 of the 1934 Act. The plaintiff and his wife were awarded damages on the first claim which, in the event, were extinguished by the award on the second claim under the 1934 Act. On that claim the learned trial Judge found that the deceased, if he had lived would have been a modest wage earner and that, after making allowance for his living expenses, he would have had an average of £416 a year remaining. Applying a 16-year multiplier, the Judge arrived at £6,656 for loss of future earnings. Thus on the second claim the plaintiff was awarded the total amount of £9,590, made up of loss of future income, £6,656; special damages, £1,184; and loss of expectation of life, £1,750. The Court of Appeal affirmed the decision in part, reducing the sum of £1,750 to $1,250.

On further appeal, the House of Lords dismissing the appeal held that (1) a cause of action vested in the deceased immediately before his death; (2) by section 1(1) of the 1934 Act that cause of action survived for the benefit of his estate; (3) since the cause of action so vesting in the deceased includes the recovery of damages for loss of earnings during the lost years and (4) since section 1(2) (c) of the 1934 Act is to be construed as referring only to losses or gains accruing because of the death and not to damages recoverable in a cause of action vesting in the deceased immediately before his death, such damages are accordingly recoverable and therefore the learned Judge was right to award damages for loss of future earnings.

In the instant case, the learned Judge awarded nothing in respect of loss of dependency because on the agreed facts the deceased before his death was an active partner in Syarikat Hock Seng Motor at 3338 Jalan Sultanah Zainab, Kota Bharu, and as

such partner was drawing $1,450 per month and after his death that very amount being the deceased's share of profit in the partnership was and is being paid to his dependants and as the dependants had suffered no loss – in fact they have gained – they are not entitled to any compensation.

The issue before us, and it is a novel issue in the Malaysian courts as stated by Sim J.C. in *Thangavelu* v. *Chia Kok Bin*[2], is whether or not the plaintiffs as representatives of the deceased's estate are entitled to damages for loss of the deceased's future earnings for the benefit of the estate.

The English legislation on which ours is modelled had its origin in the Fatal Accidents Act of 1846 which as subsequently amended over the years became the Fatal Accidents Acts 1846 to 1908, since consolidated as the Fatal Accidents Act 1976.

If a person is injured he has a cause of action and can recover damages from the wrongdoer. But if he dies from his injuries before suing and obtaining judgment, his cause of action lapses, for the common law rule is that, *"actio personalis moritur cum persona"* A personal action dies with the person, so that no executor or administrator could sue for any tort committed against the deceased in his lifetime (except injuries to property). The right of action in tort was destroyed by the death of the injured party, because an action in tort was regarded originally as purely punitive.

So if he left a widow and dependent relatives who had looked to him for their support, they could recover nothing.

What the Fatal Accidents Acts did was to give his widow and dependent relatives a statutory cause of action for their benefit.

The statutory cause of action created and authorized by the Acts is for the benefit of the deceased's dependants and the damages recoverable under them are purely compensatory and are assessed according to the court's estimate of the economic loss which the dependants have suffered and would continue to suffer in consequence of the withdrawal of the deceased's support.

The Acts did not enable the *estate* to recover damages arising out of the death, for the old common law rule *"actio personalis moritur cum persona"*, still applied. Thus the position remained until 1934 when the Law Reform (Miscellaneous Provisions) Act was passed. Section 1 of this Act abolished the old common law rule and enabled damages suffered by the deceased immediately before his death under the three heads – loss of earnings, pain and suffering and loss of expectation of life – to be recovered for the benefit of his estate in an action brought after his death.

The effect of the 1934 Act is not to create a new cause of action, but simply to enable his estate to recover these damages after his death.

As stated by Lord Scarman (page 76):

> "Section 1(1) of the 1934 Act creates no cause of action, but provides only for the survival of an *existing* cause of action."

What survives is the cause of action which accrued to the deceased immediately before his death by which he could have recovered damages.

Section 1(2) (c) however provides, as earlier indicated, that the damages recoverable for the benefit of the estate "shall be calculated without reference to any loss . . to his estate consequent on his death."

The contention here is that the instant case is a claim under section 8 of our Ordinance, it is a claim for the benefit of the deceased's estate, that the deceased was injured by his fellow hunter the defendant, that if he had not died he would have had a cause of action to recover damages for loss of future earnings, as he had died this cause of action survived for the benefit of his estate and in this action the plaintiffs should be entitled to recover damages for loss of future earnings.

While no House of Lords decision is binding on us nevertheless it is of high persuasive value, and following *Gammell*[1], I am of the opinion that the plaintiffs *are* entitled to damages for loss of future earnings.

The loss to a deceased's estate which section 1(2) (c) of the 1934 Act says may not be recovered is not any loss, but loss to his estate consequent on his *death*. Loss of future earnings is not a consequent of the death and it may therefore be recovered.

Next arises the question of quantum. As earlier stated, the deceased was in his lifetime an active partner in this Motor business and earning $1,450 a month. After his death that very amount continues to be paid to his estate. If he had survived and not

died, would the partnership not have continued to pay him that income? Because of the relationship between the partners, probably he would have continued to receive the same amount. In that case, how can it be said that he had lost anything as a result of this unfortunate accident?

The estate has lost nothing, the dependants have also lost nothing and are in fact receiving more from the deceased than what they were receiving before his death.

In the circumstances I would dismiss this appeal with costs.

Abdul Hamid F.J. concurred.

Lee Hun Hoe C.J. (Borneo): The only question in this appeal is whether on the facts the learned Judge was right not to make an award for loss of dependency.

Neither party called any witnesses. They agreed on certain facts and relied on submissions on points of law as the quantum of dependency. The learned Judge was absolved from a detailed inquiry into the financial position of the deceased by the agreement of the parties on the facts. The court can only decide on the facts agreed.

On October 14, 1977 Chua Kim Long (deceased), respondent/defendant and others went on a boar-hunting expedition at Telaga Papan, Trengganu. Each member had been assigned to take a particular position. Respondent shot and fatally wounded the deceased who had moved out of his assigned position. The deceased was 37 years of age at the time of his death. He left behind a widow and four daughters. He was an active partner in Syarikat Hock Seng Motors and was drawing $1,450 per month as such a partner. After his death his dependants were being paid what was due to deceased's shares from the partnership earning. They are still continuing to do so.

The parties agreed to special damages at $1,370 and loss of purchase 15 years. They further agreed to loss of expectation of life at $4,000 and liability of the deceased at 30% and the defendant at 70%. The learned Judge quite rightly asked the counsel for the respondent to address him merely on points of law on quantum of dependency. He did so because the dependants are continuing to receive the amount from the partnership which would go to the deceased. He would therefore, like to know what could be the loss to the dependants.

After hearing the submissions the learned Judge, with respect, correctly pointed out that the cases cited by the counsel for the respondent were where the deceased had an income and after his death the dependants were deprived of part of that income on the ground that he was no longer paid that income due to his death. But, in the case before him the dependants were not deprived of the income. In fact, they are still receiving from the partnership whatever that is due to the deceased's shares in the partnership. Deceased had no other source of income. The learned Judge made a pertinent observation that "the dependants are now getting more than they received when the deceased was still living as then the deceased would have retained some portion of the money for his personal needs."

The learned Judge referred to passages in the cases of *Bishop* v. *Cunard White Star Co. Ltd.*[3] *Davies* v. *Powell Duffryn Collieries*[4] and *Taylor* v. *O'Connor.*[5] Reference was also made to *McGregor* on Damages, 13th Edition at paragraph 1256 which sets out the law clearly:—

> "Lastly, where the deceased's sole property consists of unearned income out of which he supported the dependant, and the whole estate from which he derived this income passes to the dependant, the dependant's claim fails as there is no pecuniary loss. All that the dependant could lose was the support from that income, and since the death he has the income himself. This has been clear since the early case of *Pym* v. *Great Northern Ry,*[4] but that decision is sometimes wrongly taken as establishing the far wider, and erroneous, principal that money received from the deceased's estate must be deducted."

The learned Judge took the view that as the deceased's whole estate had passed to the dependants and as there was no pecuniary loss the dependants' claim therefore must fail. Accordingly, he made an award only on the loss of expectation of life and special damages in the sum of $3,759 representing 70% liability of the respondent and agreed costs at $1,000.

It is the submission of the appellants that *Gammell* v. *Wilson*[1] was not brought to the attention of the learned Judge, otherwise the decision might be different. That case was cited in *Thangavelu* v. *Chia Kok Bin.*[2] We were being asked to reconsider the whole basis of the assessment made by the learned Judge.

In *Thangavelu's case* the deceased was a boy of 13 years when he was killed in a road accident. At the time of his death he was working part-time for a Chinese contractor. It was this loss of earning

that the plaintiff was entitled to claim as loss of dependency which was assessed at $14,185.60. In *Gammell's case* the plaintiff's 15-year old son was killed in a road accident. Defendants admitted liability. The only issue in dispute was the quantum of damages. The claim was (1) under section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934, and (2) under the Fatal Accidents Act, 1976 for loss of dependency. For the purpose of the 1976 Act the learned Judge assessed the dependency of the plaintiff and his wife at £250 and £1750 respectively. On the claim under the 1934 Act he awarded the plaintiff damages totalling £9,590 made up of (i) £6,656 for the son's loss of future earnings during the years of life lost to him because of the defendants' negligence ('the lost years'), on the basis that he would have earned £416 a year net after deduction of living expenses to which he applied a multiplier of 16 years, (ii) £1,184 for funeral expenses including a sum of £595 for a proposed gravestone, and (iii) £1,750 for loss of expectation of life. Because of the amount of the award under the 1934 Act the learned Judge made no award under the 1976 Act since the son had died intestate and the plaintiff and his wife would receive by virtue of the award under the 1934 Act, more than the value of their dependency. Both the Court of Appeal and the House of Lords upheld the decision of the learned Judge. *Thangavelu's case* and *Gammell's case*[5] are clearly distinguishable. In both cases the common factor was loss of earning following death.

The measure of damages is the pecuniary loss suffered by the defendants as a result of the death. The pecuniary loss is the actual financial benefit of which the dependants have in fact been deprived, whether the benefit was a result of a legal obligation or of what may reasonably have been expected to take place in the future. As Lord Wright said in *Davies* v. *Powell Duffryn Associated Collieries Ltd* at page 617:—

" ..... There is no question here of what may be called sentimental damages, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities ... "

The mere existence of the relationship of husband and wife or parent and child is not enough to show pecuniary loss and does not even raise a presumption of such loss: *New Monckton Collieries Ltd.* v. *Keeling*,[7] *Lee* v. *S.S. Bessie*.[8] These are cases under the Workmen Compensation Act, but the principle is equally applicable to the Fatal Accidents Acts.

In calculating damages the court has to consider the pecuniary sum which will make good to the sufferer, so far as money can do, the loss which he has suffered as the natural result of the wrong done to him. There can be only one award under the Civil Law Act. The award will be either under section 7 or section 8 of the Act. It is not uncommon where the award for loss of dependency exceeds that which could be awarded for loss of expectation of life that the latter becomes merged in the award made under section 7 of the Act. Awards, of course, vary with the circumstances of the case and also from Judge to Judge. Also, each case must depend upon its own facts. In this case the widow has since the death of deceased been receiving monthly payment not less than what deceased was getting from the partnership. Every plaintiff must understand that, if he brings an action for damages it is for him to prove his damage; it is not enough to write down particulars, and, so to speak, throw them at the head of the court by saying that that was what he had lost and that was the amount of damages he would ask for. It is not as simple as that. He has to prove it.

The respondent does not dispute that under *Gammell's case* the award for the lost years was for loss of earning. Assuming that in our case the deceased had not died he would not be able to claim for loss of earning. Except for the partnership earning he was not earning anything. Therefore, where there was no earning there could be no loss of earning. That in fact was the finding of the learned Judge. On the facts as agreed we see no reason to interfere with his decision. The situation is unfortunate but it does not in itself make the learned Judge's assessment erroneous. Accordingly, I would dismiss the appeal with costs. Deposit to respondent to account of taxed costs.

Appeal dismissed.

Solicitors: *Foo Say Ghee & Co.; Dzaiddin & Co.*

PUBLIC PROSECUTOR v. MUHAMED BIN SULAIMAN

[F.C. (Suffian L.P., Wan Suleiman and Abdul Hamid F.JJ.) August 24, 1982]

[Kuala Lumpur — Federal Court Criminal Appeal No.27 of 1981]

Criminal Law & Procedure — Charge of Murder — Judge directing jury to acquit and discharge accused —